Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

JOHN WENTWORTH EVANS,
Petitioner,
vs.
ALEXANDER WEIR, III, BRUCE R. WEIR,
CAROL J. ASHMAN AND ALEXANDER WEIR, JR.
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the due process considerations outlined by this Court in *Ungar v. Sarafite*, 376 U.S. 575 (1963) extend to a civil litigant who seeks a continuance so that counsel can prepare for trial?

2. Does a trial court's denial of a request for continuance, precluding a civil litigant from having prepared counsel at trial, violate that party's constitutionally protected right to a fair trial under the 5th and 14th amendments?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PETITION FOR A WRIT OF CERTIORARI	1
STATEMENT OF FACTS	2
1. Background	2
2. The Nature of Respondents' Investments	4
3. Course of the Hearing on the Accounting and Surcharge Issues	5
4. The Decision Below	9
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	14
Appendix 1	
Judgment of the Los Angeles Superior Court (June 17, 1991)	1a
Appendix 2	
Opinion of the California Court of Appeal, Second Appellate District, Division One, Affirming the Judgment of the Los Angeles Superior Court (November 4, 1993)	4a
Appendix 3	
California Supreme Court; Denial of a Petition for Review (January 26, 1994)	12a
Appendix 4	
Ex Parte Application to the Los Angeles Superior Court for Order to Continue Date of Surcharge Hearing (February 7, 1991)	13a

TABLE OF AUTHORITIES

Cases

	Page
Anderson v. Sheppard, 856 F.2d 741 (6th Cir. 1988)	12, 13
Grogan v. Garner, 498 U.S. 279 (1991)	3
Ungar v. Sarafite, 376 U.S. 575 (1963)	10, 11, 12, 13
United States v. Heine, 920 F.2d 552 (8th Cir. 1990)	13
United States v. Lustig, 555 F.2d 737 (9th Cir. 1977), *cert. den'd* 434 U.S. 926	12, 13
United States v. McManaman, 653 F.2d 458 (10th Cir. 1981)	11, 13
United States v. West, 828 F.2d 1468 (9th Cir. 1987)	11, 13

United States Constitution

Fifth Amendment	2, 12
Fourteenth Amendment	2

Statutes

28 USC § 1257(a)	2
California Probate Code § 16440	3

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Wentworth Evans respectfully prays that a writ of certiorari issue to review the opinion of the California Court of Appeal, Second Appellate Division, District One, entered in the above-captioned proceeding on November 4, 1993, affirming a judgment entered in favor of respondents dated June 17, 1991.

OPINIONS BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, District One, is unre-

ported. That opinion is reprinted in the Appendix annexed hereto as Appendix 2.

The judgment of the Los Angeles Superior Court is set forth in the Appendix as Appendix 1.

JURISDICTION

On January 26, 1994 the California Supreme Court denied petitioner's petition for a hearing. See Appendix 3. Jurisdiction to hear this writ of certiorari is thereby conferred in this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fifth Amendment in the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . ;

The Fourteenth Amendment of the United States Constitution provides, in part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ;

STATEMENT OF FACTS

1. Background

Petitioner and Alexander Weir, Jr. ("respondent") first met in the early 1970s when they were both employees of Southern California Edison Company, a large utility company. Petitioner was an in-house attorney whose practice was limited to contract work; respondent was a scientist with a Ph.D in chemical engineering. In 1973 or 1974, respondent requested petitioner's assistance in negotiating a patent

license agreement. Pursuant to the license agreement, respondent received in excess of $700,000 in royalties.

In order to shelter income and minimize estate tax problems for his family, respondent and his wife in 1978 and 1981 established two irrevocable family trusts for the benefit of their children, Alexander Weir III, Bruce Weir and Carol Ashman. Respondent's children were thus named beneficiaries of the family trust; respondent was the settlor; and petitioner, respondent's friend and attorney, was named sole trustee.

On April 28, 1989 the beneficiaries of the Weir Family trust filed an action to remove petitioner as trustee and for an accounting. Following a contested hearing, petitioner was removed as trustee by order of the Los Angeles Superior Court, filed January 10, 1990. Petitioner was further ordered to provide a final accounting on the trust within ninety days, at which time the beneficiaries' request for a surcharge pursuant to the provisions of California Probate Code § 16440 would be considered.

On April 6, 1990, petitioner filed his final accounting. Nine weeks later, the trust beneficiaries filed objections to that accounting. Immediately thereafter, petitioner's attorney substituted out of the matter and petitioner substituted himself as his own counsel.

Following petitioner's commencement of a Chapter 7 petition, the beneficiaries obtained relief from the automatic stay. Trial on the contested accounting and surcharge issues was set for February 11, 1991 in the Los Angeles Superior Court. Following this Court's decision in *Grogan v. Garner*, 498 U.S. 279 (1991), the insurance company which had agreed to represent petitioner in connection with certain adversary actions brought against him in his bankruptcy agreed for the first time to provide petitioner with a defense in the accounting and surcharge action.

On February 5, 1991, petitioner obtained counsel in connection with that proceeding. Two days later, petitioner's new counsel filed an ex-parte application for a ninety day continuance of the trial on the accounting and surcharge issue. In the application, new counsel for petitioner stated that a continuance was necessary so as to permit an adequate accounting to be provided in accordance with the Los Angeles Superior Court rules. See Appendix 4. Counsel also indicated that because of the complexity of the factual issues presented by the surcharge issue, additional time was necessary to permit petitioner's attorneys to learn the factual background of the case as well as to subpoena appropriate witnesses and to prepare necessary direct and cross-examination. Although no opposition to the request for a continuance was filed, the application was denied. The lower court offered no opinion in denying the application. Trial then was ordered to proceed as scheduled for February 11, 1991.

Because of the complex nature of the investments which the Weir family trusts made in the 1980s, petitioner's newly appointed counsel was not in a position to understand the issues involved at the trial and could not direct petitioner's defense. This compelled petitioner, an in-house corporate lawyer with no litigation background, to undertake the task of representing himself in a complex trial in which he had no idea of the procedural and substantive hurdles confronting him.

2. The Nature of Respondents' Investments

The factual complexity of the trial arose from the nature of the family trusts' investments. In an effort to maximize the settlor's desire to increase the trusts' *res*, the trusts made a series of investments through Swiss banks. In an effort to augment the size of the trusts' assets, the trusts borrowed substantial sums of money from Swiss banks. These loans were all denominated in Swiss francs. With the proceeds of

these loans, the trusts purchased blue chip securities largely denominated in U.S. dollars.

In the first half of the 1980's, the steady appreciation of the dollar against the Swiss franc increased the value of the assets held by the trusts. However, subsequent to early 1985, the dollar began a steady decline against the Swiss franc which, in the next few years, caused its value to drop by over half. The effect of this collapse in the value of the dollar greatly imperiled the trusts since the loans which had permitted leveraged investments to be made were denominated in Swiss francs. With the constant appreciation of the franc against the dollar, the value of the Swiss franc denominated debts of the trusts increased dramatically after 1985. By 1989, the combination of the stock market crash of October 1987 and the erosion of the value of the dollar against the Swiss franc had wiped out the asset value of the trusts. This loss of the trusts' *res* promptly led to the commencement of proceedings against petitioner.

3. Course of the Hearing on the Accounting and Surcharge Issues

On February 11 and 13, 1991 a two day trial in connection with the accounting and surcharge occurred. Although petitioner's insurer-appointed counsel had associated himself into the case, petitioner's newly appointed attorney made it clear that because of the complexity of the issues involved and the fact that he had only just been retained, petitioner himself would have to act as his own attorney in the proceedings. Because of his inability to prepare for trial counsel for petitioner was rendered a mere bystander during trial.

Reflecting a complete inability to understand the adversary nature of litigation, petitioner made numerous unprovoked gratuitous admissions, failed to produce witnesses beneficial to his case, proved incapable of cross-examining

respondent and showed a total failure to elicit testimony on direct or cross-examination that was remotely favorable to his position. All of these procedural fiascos, which deprived petitioner of his due process right to a fair trial, occurred by virtue of the trial court's refusal to continue the trial for a brief period of time so that newly appointed counsel could prepare a defense for petitioner.

The reporter's transcript from the trial contains overwhelming evidence of petitioner's inability to operate in the litigation arena and to put on a defense. At the beginning of the hearing, after petitioner's newly appointed counsel explained why he could not personally conduct the trial, the following gratuitous colloquy occurred:

> "THE COURT: Mr. Evans, you were about to tell me something.
>
> MR. EVANS: Your Honor, I am prepared to stipulate that the investments which you have just recited are — would be imprudent in terms of the standard for investing trust funds."

The trial judge then indicated that he had problems regarding the accounting which Petitioner had filed. Petitioner, without any provocation, conceded that he had no idea of how to put together an appropriate accounting.

> "THE COURT: If no one is going to object to that as irrelevant, I will.
>
> MR. EVANS: Well, Your Honor, that's the crux of the whole thing."
>
> "THE COURT: I know what the crux of this is, and I know what alternatives you want the court to go after. I have read the file. I have read the alternative schedule. I know what a schedule looks like.

> "MR. EVANS: I don't know what they look like, and there is no doubt the schedules could be substantially better."

The trial judge found that the critical issue at the trial was whether the settlor of the trusts had directed assets of the trusts to be placed into a leveraged Swiss investment program. Throughout the trial, the trial court specifically directed the petitioner to put on evidence regarding the settlor's intent in this regard. Notwithstanding the court's admonitions, petitioner repeatedly stated that he could not proffer any evidence showing how respondent/settlor had wanted assets of the trusts invested:

> "MR. EVANS: And I can sit here, Your Honor, and lead the witness through each investment and point out exactly what happened in each investment, and I can demonstrate where the money went. I am not able to point to any document that I have in my possession that is, in essence, from Dr. Weir saying, put the money here, period. This whole issue is one of credibility, Your Honor. Although I can tell you where everything went, that's as best I can do."

In an effort to try to show that respondent had required that trust assets be placed into a leveraged Swiss investment program, subpoenas were served on respondent's children, the beneficiaries of the trusts. Respondent's counsel moved to quash those subpoenas on the grounds that the testimony of the beneficiaries was not relevant. The trial court then invited petitioner to explain why the beneficiaries' testimony would be germane:

> "THE COURT: So the beneficiaries are going to say, we don't care what the trustor did, what the trustee did.
>
> MR. EVANS: I don't think they are going to say that, but I think Bruce Weir will indicate he knew exactly where the money was, why it was that Dr. Weir

instructed me to put it there, and that it was all explained to him.

THE COURT: That doesn't get you far unless you are going to say that. Unless you said, in Bruce Weir's presence, I made an unauthorized — I made an investment that is not a proper trust investment, Dr. Weir instructed me to make this investment in unauthorized trust assets, and I did it all at his request and Bruce Weir sat there and said, that's nice, what do you think about the Dodgers this season. I haven't heard the evidence, and maybe that's what happened.

MR. EVANS: I can stipulate, Your Honor, that's not what happened."

Notwithstanding the trial court's concern that testimony of the beneficiaries could only be of marginal relevance to the question of the settlor's direction of trust investments, that court made it clear that it would permit the subpoenaed witnesses to testify until petitioner, consistent with his complete failure to understand the litigation process, stated that the beneficiaries would not provide testimony concerning respondent's desires concerning the investments of the trusts:

"THE COURT: I'm not going to quash the subpoena. It's very, very marginally relevant.

The reason I have trouble ruling on it is because Mr. Evans is so elusive as to what he intends these people will say. I have set forth the groundwork pretty well. You have to have the statement of Dr. Weir that I, Dr. Weir, have been the precipitating force, precipitating power behind these investments, that I am aware that Switzerland accounts are not a proper trust investment, but I want you, Mr. Evans, nonetheless, to invest my money in these accounts. And you have to have Bruce Weir hearing that, acknowledging that. If it

didn't happen, it didn't happen, and we're not going to get very far. But I don't know whether that happened or not. I won't prejudge that until and unless I hear it.

"MR. EVANS: I will admit that didn't happen. If that's the standard, there is really no —

"THE COURT: All right. So I will quash the subpoena as to those witnesses then."

4. The Decision Below

Based upon petitioner's admission that he had caused the trusts to make imprudent investments and that he lacked the ability to introduce evidence showing that respondent had directed him to invest assets of the trusts in speculative leveraged investments whose success was contingent upon the continuation of favorable exchange rates, it is not surprising that the trustee was surcharged. Thus the trial court, on June 17, 1991 entered a judgment after trial surcharging petitioner $404,500.00, together with interest from January 1, 1984 to the date of entry of judgment.

On November 4, 1993 the Court of Appeal of the State of California, Second Appellate District, Division One, in an unpublished opinion, affirmed the judgment of the trial court. A petition to the California Supreme Court was timely filed. On January 26, 1994, the California Supreme Court denied the petition for review.

REASONS FOR GRANTING THE PETITION

The factual presentation demonstrates that Petitioner was denied his rights to due process. At the surcharge hearing, Petitioner was burdened with factual circumstances which made it impossible for a fair hearing to occur.

Petitioner proceeded to the surcharge hearing with unprepared counsel, with an accounting which was absent neces-

sary information and which negatively impacted on his credibility, and with a complete inability to defend himself.

In *Ungar v. Sarafite*, 376 U.S. 575 (1963), this Court articulated upon the due process considerations when a request to continue a trial is denied. In *Ungar*, an attorney charged with contempt for refusing to answer several questions at an earlier trial, requested a continuance of the contempt trial so as to engage counsel to represent him. The trial court, having granted two previous requests for short continuances, denied the request. This Court held that under the circumstances presented, the denial of the motion to continue did not violate the petitioner's right to due process. In so ruling, this Court took account of the fact that the petitioner had been given adequate time "to hire counsel and to prepare a defense to a case in which the evidence was fresh, the witnesses and the evidence readily available, the issues limited and clear cut and the charge revolving around one statement made by Ungar during a recently completed trial." *Id.*

This Court then stated as follows:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [citation omitted] Contrarywise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality [citation omitted]. There are no mechanical tests for deciding whether a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied. [Citations omitted]. *Id.*, at 575.

Numerous circuit courts have relied and expanded upon this discussion in *Ungar*. In *United States v. McManaman*, 653 F.2d 458 (10th Cir. 1981), the court reviewed a lower court's denial of a criminal defendant's motion to continue his trial date so as to accommodate the schedule of one of his two trial attorneys. Citing *Ungar*, the court stated that the lower court did not abuse its discretion in denying the request given that the record revealed that the lower court "did not treat defendant's request in a casual manner, as is evidenced by the detailed statement explaining his denial of the continuance." *Id.* at 460. In that regard, the court found that the defendant had an attorney who was ready to proceed to trial and who was fully conversant with the case.

In *United States v. West*, 828 F.2d 1468 (9th Cir. 1987), the court offered the following factors in determining whether a lower court's denial of a request to continue a trial date had been arbitrarily unreasonable and prejudicial to the requesting party. The court stated:

> "To determine whether the denial of a continuance is arbitrary or unreasonable, we looked at several factors, including: The diligence of a party requesting the continuance; the likelihood that the continuance, if granted, would accomplish the purpose underlying the party's expressed need for the continuance; the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; the need asserted for the continuance and the harm that appellant might suffer as a result of the district court's denial of the continuance. [citations omitted]"

Id. at 1469-1470.

The court then stated that:

> "No single factor is determinative and the weight given to any one may vary depending upon the extent of the appellants showing on the others." *Id.* at 1470.

Although this Court in *Ungar* did not narrow its discussion to the due process rights of criminal defendants, the context presented to the Court in *Ungar* was of a quasi-criminal nature and nearly all of *Ungar*'s progeny focus upon the rights of criminal defendants. In *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988), however, the court relied heavily upon this Court's discussion in *Ungar* in a matter involving a civil litigant suing for race discrimination. In *Anderson*, two days before the scheduled trial date, plaintiff requested a continuance to permit him to obtain new counsel. This request was necessitated because plaintiff's counsel had suddenly withdrawn from the case. That request was denied. one day before the scheduled trial date, the plaintiff again requested a continuance and in doing so represented to the court that he would be able to secure counsel provided that the new attorney had sixty days to prepare for the trial. The second request was also denied. Recognizing that a civil litigant has a right to be represented by retained counsel and that that right is rooted in Fifth Amendment notions of due process, the court, with direct reference and reliance upon *Ungar*, held that the lower court had infringed on the appellant's due process rights to retain counsel. *Id.* at 749.

The court further stated that since "the right to retain counsel is fundamental to a fair trial, we will not consider whether the error was harmless." *Id.* at 749. The Court did, however, state in a footnote that if it was required to examine the record for reversible error, the record demonstrated time and time again that the error was far from harmless given that the appellant, forced to represent himself, clearly did not know what he was doing. *Id.* at 749, fn.3.

In *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977), cert denied, 434 U.S. 926, the court held that it could examine the trial record to determine if a party who had requested a trial continuance — so as to permit counsel to be fully prepared — was in any way prejudiced by the denial

of that request. *Id.* at 744-745. In particular, the court in *Lustig* stated that the record should be reviewed to determine if the legal representation which the appellant had been afforded was adequate. *Id.* at 744; see also *United States v. Heine*, 920 F.2d 552, 555 (8th Cir. 1990) (Citing *Ungar, supra*, the court stated that in determining whether a trial court had abused its discretion in denying a motion for a trial continuance, the following factors should be considered: "Whether counsel has sufficient time to prepare for trial; whether counsel's conduct at trial showed that he was well prepared; whether the court's refusal to grant the continuance prejudiced the defendant.")

Petitioner's request for a continuance should have been granted given that his attorney was clearly unprepared, there would have been no prejudice to the opposing side or to the court in continuing the hearing, and the harm experienced by Petitioner in being forced to proceed with the unprepared counsel was substantial and irreparable. *United States v. McManaman, United States v. West, supra.* Petitioner, even as a civil litigant, had a right to counsel. Under the circumstances, he was deprived of that right and, a fortiori, was deprived of the right to a fair hearing. *Anderson v. Sheppard, supra.*

In light of the facts presented, and the case law offered, this court is respectfully requested to specifically extend its discussion in *Ungar* to civil litigants.

CONCLUSION

The petition for a writ of certiorari should be granted.

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